IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-6235

RECEIVED
MAR 22 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ALBERT "BO" THOMPSON, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 19th DAY OF March, 1982.

Brian P. Gibbes
ATTORNEY FOR Respondent

SWORN TO BEFORE ME THIS 19th DAY OF March, 1982.

Karen Y. Newton (L.S.)
Notary Public for South Carolina
My Commission Expires 9-17-86

QUESTIONS PRESENTED

I.

Was the South Carolina Death Penalty statute applied in Petitioner's case in violation of the Eighth Amendment?

II.

Did the lower court err in excusing for cause jurors who could not abide by their oaths because of their opposition to capital punishment?

III.

Did the lower court properly conclude that no legal prejudice resulted from pretrial publicity in the case?

INDEX

Questions Presented ---------- i

Cases Involved ---------- iii

Opinion Below ---------- 1

Jurisdiction ---------- 1

Questions Presented ---------- 1

Argument

Question I ---------- 2

Question II ---------- 4

Question III ---------- 6

Conclusion ---------- 11

CASES INVOLVED

Adams v. Texas, 448 U.S. ___, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980) ---------- 4

DeLee v. Knight, 266 S.C. 103, 112, 221 S.E. 2d 844, 847 (1975) ---------- 9

Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 1643, 66 L. Ed. 751 (1961) ---------- 9

State v. Crowe, 258 S.C. 258, 188 S.E. 2d 379, cert. den. 409 U.S. 1077, 93 S. Ct. 691, 34 L. Ed. 2d 666 (1972) - 9

State v. Fowler, 266 S.C. 203, 207, 222 S.E. 2d 497, 499 (1976) ---------- 9, 10

State v. Franklin, 267 S.C. 240, 226 S.E. 2d 896 (1976) ---- 4

State v. Goolsby, ___ S.C. ___, 268 S.E. 2d 31 (1980) ------ 4, 5

State v. Jones, 268 S.C. 227, 233 S.E. 2d 287 (1977) ------- 4

State v. Linder, ___ S.C. ___, 278 S.E. 2d 335 (1981) ------ 6

State v. Middleton, 207 S.C. 478, 497, 36 S.E. 2d 742, 749 (1946) ---------- 9

State v. Neeley, 271 S.C. 33, 244 S.E. 2d 522 (1978) ------- 4, 8, 9

State v. Tyner, 273 S.C. 646, 258 S.E. 2d 559 (1979) ------- 5, 8

State v. Valenti, 265 S.C. 380, 218 S.E. 2d 726 (1975) ----- 8

State v. Watkins, 259 S.C. 185, 191 S.E. 2d 135 (1972), vac. on oth'r grounds., 413 U.S. 905, 37 L. Ed. 2d 1016, 93 S. Ct. 3035 ---------- 4

Weatherford v. Bursey, 429 U.S. 545, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977) ---------- 3

Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968) ---------- 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

ALBERT "BO" THOMPSON, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion Number 21596, filed November 23, 1981, as reproduced in Petitioner's Appendix A at pages 3-6 and the corrected opinion as Appendix B directly thereafter.

JURISDICTION

Respondent does not question the Court's jurisdiction in the proceeding.

QUESTIONS PRESENTED

I.

Was the South Carolina Death Penalty statute applied in Petitioner's case in violation of the Eighth Amendment?

II.

Did the lower court err in excusing for cause jurors who could not abide by their oaths because of their opposition to capital punishment?

III.

Did the lower court properly conclude that no legal prejudice resulted from pretrial publicity in the case?

ARGUMENT

The South Carolina Death Penalty statute was not applied in Petitioner's case in violation of the Eighth Amendment.

This matter came before the trial court by a motion on behalf of the defendant seeking an injunction against the State to prevent it from seeking the death penalty in the case. (Tr. p. 1404-p. 1408). The lower court held a hearing on the motion on July 21, 1980. Although Petitioner's counsel alleged in their motion that the Solicitor had made an offer of a life sentence in return for a plea of guilty, the Solicitor had a different view of the facts. It appears undisputed from the record that there was some discussion about a negotiated plea at the time Notice of Intent to Seek the Death Penalty was served upon opposing counsel. (Tr. p. 1281, lines 9-21). During these initial discussions, Appellant and his counsel took the position that he would not plead guilty to any charge. (There was an armed robbery charge against Petitioner pending in Pickens County at the time). (Tr. p. 3, lines 19-25). After another of Petitioner's convictions in Pickens County, counsel advised the Solicitor that they were in a position to plead their client guilty. (Tr. p. 1282, lines 4-8). In response to this proposal, the Solicitor advised counsel that he would consider a plea of guilty only upon a firm commitment by the accused,

and that he would also discuss the matter with the victim's family before coming to a final decision. (Tr. p. 1282, lines 8-16). One of the Solicitor's reasons for consulting with the family was the very real possibility that the victim's family members had indicated an extreme reluctance to go through a trial and testify because of the emotional strain. (Tr. p. 1284, lines 7-14). Although the Solicitor indicated a personal desire to dispose of the case expeditiously because of certain personal commitments with the United States Army, it seems clear from arguments on behalf of both parties that there was no firm commitment on behalf of the State to recommend a life sentence in exchange for a plea of guilty. (Tr. p. 1282, line 9-p. 1286, line 15).

The lower court denied Petitioner's motion for an injunction, finding as a matter of fact that no firm commitment had been made by the State concerning the consequences of an offer by the defendant to plead guilty. (Tr. p. 1293, line 2-p. 1294, line 19). It should be noted that, after the lower court denied Petitioner's motion for an injunction, it granted Petitioner's counsel a continuance in order to prepare for trial inasmuch as they had been retained in the case for 34 days. (Tr. p. 1341, lines 20-24). The continuance was given until September 22, 1980). (Tr. p. ii).

Respondent would respectfully submit that Petitioner has no constitutional right to a plea bargain. Weatherford v. Bursey, 429 U.S. 545, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977). He has demonstrated no prejudice to his rights under the South Carolina or Federal Constitutions arising from the

conduct of plea negotiations in this case. The fact that he obtained a continuance from July 21, 1980, until September 22, 1980 would belie any such assertion and, therefore, his rights to a fundamentally fair trial were preserved.

II.

The lower court did not err in excusing for cause jurors who could not abide by their oaths because of their opposition to capital punishment.

On this issue Petitioner claims that four jurors were erroneously excused for cause under the rule of Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968). Generally, the question of the partiality of a juror is addressed to the sound discretion of the trial court. South Carolina Code Section 14-7-1020 (1976). State v. Neeley, 271 S.C. 33, 244 S.E. 2d 522 (1978); State v. Jones, 268 S.C. 227, 233 S.E. 2d 287 (1977); State v. Franklin, 267 S.C. 240, 226 S.E. 2d 896 (1976). The decision of a trial court on this issue is not reviewable on appeal unless wholly unsupported by the evidence. State v. Watkins, 259 S.C. 185, 191 S.E. 2d 135 (1972), vac. on oth'r gr'nds., 413 U.S. 905, 37 L. Ed. 2d 1016, 93 S. Ct. 3035. In this connection it should be noted that a general objection to the death penalty is no reason for a trial judge to excuse veniremen for cause, rather, it must be a belief which would prevent the potential juror from rendering an impartial decision as required by the juror's oath. Adams v. Texas, 448 U.S. ___, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980); Witherspoon v. Illinois, supra; State v. Goolsby, ___ S.C. ___,

268 S.E. 2d 31 (1980). Respondent would respectfully submit that there was sufficient evidence to support the lower court's finding that these jurors should be disqualified for cause.

In support of his argument on this claim Petitioner examines, out of context, testimony of the prospective jurors which he claims were improperly disqualified. However, this Court has clearly stated that the voir dire examination of a prospective juror in a death penalty case must be viewed in its entirety to determine the juror's unwillingness to vote for the death penalty under any circumstances. State v. Tyner, 273 S.C. 646, 258 S.E. 2d 559 (1979). As to the jurors subject to Petitioner's objection we would simply cite the following portions of the Transcript of Record to show that the trial court properly applied the standards set forth in Tyner and in State v. Goolsby, __ S.C. ___, 268 S.E. 2d 31 (1980);

Allen J. Ravan
(Tr. p. 751, line 17-p. 753, line 9).

Samuel P. Clayton
(Tr. p. 292, line 4-p. 299, line 1).

Elizabeth F. League
(Tr. p. 371, line 2-p. 372, line 8; p. 374, line 7-p. 375, line 14).

Dorothy H. White
(Tr. p. 646, line 9-p. 649, line 10).

The testimony of these jurors indicated that they did not simply entertain a "general objection" to the death penalty, but, rather, could not personally participate impartially in the decision to consider whether a defendant should live or die.

Petitioner's argument that disqualification for cause can be limited to jurors who could not render a verdict of guilty has been resolved against him in the South Carolina Supreme Court's opinion in State v. Linder, ___ S.C. ___, 278 S.E. 2d 335 (1981).

III.

The lower court properly concluded that no legal prejudice resulted from pretrial publicity in the case.

On this issue Petitioner claims he was entitled to a change of venue because of publicity arising from an altercation which he had with an inmate several days prior to the September 22, 1980 trial. Petitioner produced testimony showing the content of the report concerning the incident. (Tr. p. 2, line 17-p. 41, line 2). Also, counsel introduced into evidence a film tape showing Petitioner, his attorney, and a plain clothes officer during a television interview of Petitioner's counsel concerning the incident. (Tr. p. 86, line 18-p. 110, line 22). Also, Petitioner submitted testimony of Mr. Thomas Nessler, Mr. Theo W. Mithcell, and Mr. Stephen Henry on the question of whether the pretrial publicity was so extensive as to require a change of venue. (Tr. p. 44, line 24-p. 55, line 19; p. 61, line 7-p. 67, line 2). The defense also introduced affidavits of various people concerning the television coverage of this incident. (Tr. p. 111, lines 1-14). After considering the evidence, the lower court made the following findings:

> This publicity which you are referring to in no way makes any reference to the crime for which this defendant is to go on trial today. It merely states almost parenthetically that he was charged with this offense and will go on trial.
>
> By the same token, the publicity about which--the crime about which the publicity is extant is not basically inflammatory, it is not suggested that the defendant has committed some heinous offense and it in no way editorializes. It is a reasonably, straight forward, factual reporting as news media can ever do, that is, reporting what someone else told them.
>
> * * *
>
> For the record, I find that the newspaper articles are extremely low key. They are not headlined. The defendant's name is not even mentioned in the headlines, it just says inmate charged with assault. There is no great embellishment in the articles, suggestive of the fact that there is a desperate, hardened person whom we need to do something with. (Tr. p. 118, line 18-p. 119, line 3; p. 119, lines 12-17).

Consequently, the trial judge ruled that he could not conclude, without the benefit of placing the jury on its voir dire, that the pretrial publicity so infected the community that Petitioner could not receive a fair trial. (Tr. p. 120, line 12-p. 121, line 15).

It should also be noted that the witnesses who testified before the court on behalf of Petitioner's motion could not conclude that the publicity was so prejudicial as to obviate the necessity of placing potential jurors on their voir dire. (Tr. p. 48, lines 9-21; p. 52, lines 9-15; p. 66, lines 12-24). In fact, the trial judge carefully examined potential jurors to determine the extent of their knowledge of pretrial publicity and the affect such publicity would have upon their ability to

be impartial jurors. (Tr. p. 216, line 15-p. 217, line 6; p. 243, line 18-p. 244, line 11; p. 250, lines 5-20; p. 263, lines 12-25; p. 277, lines. 9-18; p. 290, lines 4-23; p. 301, line 4-p. 302, line 6; p. 322, lines 2-23; p. 334, lines 4-25; p. 354, lines 6-17; p. 361, lines 5-20; p. 369, line 23-p. 370, line 11; p. 377, lines 7-25; p. 400, line 14-p. 403, line 6; p. 414, lines 10-17; p. 427, lines 2-7; p. 446, line 15-p. 447, line 3; p. 445, lines 12-19; p. 469, lines 19-p. 470, lines 16; p. 491, line 2-p. 492, line 6; p. 506, line 3-p. 507, line 3; p. 518, lines 2-23; p. 529, lines 2-15; p. 541, lines 2-10). After considerable examination of the jury during voir dire proceedings, the trial judge found that the venire was not, in fact, infected with prejudicial pretrial publicity. (Tr. p. 695, line 17-p. 697, line 8). Only two potential jurors indicated such a knowledge of the jailhouse assault as to prompt the exercise of the trial judge's sound discretion in excusing them for cause. (Tr. p. 553, line 17-p. 573, line 9; p. 631, line 3-p. 643, line 5).

"Motions for change of venue are addressed to the sound discretion of the trial judge, and his decision will not be reversed absent an abuse of discretion." State v. Tyner, 273 S.C. 646, 649, 258 S.E. 2d 559, 561 (1979), citing State v. Neeley, 271 S.C. 33, 244 S.E. 2d 522 (1978); State v. Valenti, 265 S.C. 380, 218 S.E. 2d 726 (1975). Where a defedant alleges that pretrial publicity has violated his right to a fair trial "normally he must show the jurors were aware of the publicity

and that the publicity constituted legal prejudice." State v. Fowler, 266 S.C. 203, 207, 222 S.E. 2d 497, 499 (1976). Respondent further respectfully submits that the following rule of law is controlling on this issue:

> Where the trial judge bases his ruling on adequate voir dire examination of the jurors, his conclusion that the objectivity of the jury panel has not been polluted with outside influence will not be disturbed absent extraordinary circumstances. State v. Neeley, 271 S.C. 33, 244 S.E. 2d 522 (1978), citing State v. Fowler, supra; State v. Crowe, 258 S.C. 258, 188 S.E. 2d 379, cert. den. 409 U.S. 1077, 93 S. Ct. 691, 34 L. Ed. 2d 666 (1972).

The reason for this principle of law lies in the fact that the trial judge is most capable of considering the demeanor and attitude of the juror as he or she responds to voir dire examination. As stated by this Court in DeLee v. Knight, 266 S.C. 103, 112, 221 S.E. 2d 844, 847 (1975), quoting State v. Middleton, 207 S.C. 478, 497, 36 S.E. 2d 742, 749 (1946), "'the manner and bearing of the juror, nature's stamp of character on form and countenance are evidential exhibits for the circuit judge which may indicate the juror's real attitude more than his words.'" In this regard it should also be noted that a juror is not automatically disqualified simply because he or she has been exposed to adverse publicity concerning a particular defendant. "'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" State v. Fowler, supra, 266 S.C. at 207, 222 S.E. 2d at 499 (1976), quoting Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 1643, 66 L. Ed. 751 (1961).

Respondent respectfully submits that this issue is resolved against Petitioner by the South Carolina Supreme Court's decision

in State v. Fowler, supra, where the Court upheld the denial of a motion for a change of venue where Appellant submitted for consideration eleven (11) articles printed in newspapers with wide circulation in the county, each concerned with reports of the murder for which Appellant was charged and the resulting manhunt conducted by law enforcement officers to capture Appellant and another suspect. The record showed that the local sheriff had been interviewed by radio and television stations regarding the investigation of the case and the victim of the crime, who was a highway patrolman. The defendant had submitted affidavits of six local attorneys who concluded that the defendant could not obtain a fair and impartial trial in the area. The State presented no counter affidavits or testimony in opposition to the motion for a change of venue. The South Carolina Supreme Court ruled that the trial judge properly resolved any issue as to prejudice cause by pretrial publicity in the conduct of its voir dire examination. There, as in this case, the trial judge was satisfied that each juror was free from disabling prejudices. Petitioner's contention is clearly without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT.